IN THE

Supreme Court of the United States

October Term, A. D. 1944

No. 1235

FRANK L. NATHANSON,
Petitioner,

vs.

STATE OF ILLINOIS,
Respondent.

PETITION

FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The petition of Frank L. Nathanson by Wm. Scott Stewart, his counsel, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved. Summary of the Record.

Your petitioner, a physician and surgeon, a citizen of the United States, was convicted in the Criminal Court of Cook County, Illinois, for the crime of conspiracy and

sentenced to jail and to pay a fine. His conviction has been affirmed by the Supreme Court of Illinois (389 Ill. 311).

The Indictment.

The indictment consists of two counts (Abst. 2). The substance of the first (Abst. 3) is that the defendants conspired by unknown means to cause a large number of pregnant women to abort when the abortions were unnecessary for the preservation of life. The second count (Abst. 4), which was dismissed, alleged a conspiracy to cause a particular woman named therein to miscarry. The indictment names, besides the doctor, Gladys McCall, Nancy Rosenbush, Joe Doe and persons unknown. Nancy Rosenbush and John Doe were not apprehended. Gladys McCall was tried jointly with the doctor and was directed out of the case by the court at the conclusion of all of the evidence (Abst. 56). Gladys McCall was the receptionist in the doctor's office, Nancy Rosenbush was the nurse, and a man who gave the anesthetic, referred to as an interne, appears to have been designated as John Doe.

The Evidence.

There was no direct evidence of a conspiracy, nor did the State claim any admissions or confession. The defendants did not testify nor did they introduce any other evidence. It is contended that no conspiracy existed and that none was proved. The only possible claim that the State could have to proof of a conspiracy would necessarily be circumstantial.

Prior to the trial the defendant Nathanson moved to quash the indictment, without success (Abst. 6), and a motion for a bill of particulars was denied (Abst. 6). The defendants took the position that the allegation

in the indictment that the women to be aborted were unknown to the grand jury was false. The only women, known or unknown, mentioned as having been thought to be pregnant before the grand jury, as shown by the record (Abst. 53), and mentioned, described or referred to at the trial were those women whose names were endorsed upon the indictment (Abst. 4). It is contended that the evidence merely creates a suspicion that some of these women may have been aborted by the defendant.

Bernice Ceropski (Abst. 9) testified that she was a married woman working as a candy wrapper. She described her experiences at the office concerning a conversation with the doctor and the manner in which she was given an anesthetic. It appears that complications set in and that subsequently she was treated by another doctor who appeared as a witness (Abst. 46).

There is no proof except her own opinion that she was pregnant. She did not claim to know what was done to her by Dr. Nathanson, nor could she know whether the operation, if any, was necessary. Her next doctor (Abst. 46) did not express any opinion on the subject of pregnancy or the possible use of instruments. The prosecutor asked this doctor if he had an opinion as to whether an abortion had been performed. The court properly sustained our objection (Abst. 49).

Betty Diamond (Abst. 36) and her stepfather (Abst. 43) testified to a trip to the doctor's office. They testified concerning an examination and an arrangement for treatments. Betty was named in the second count, which was nolled. After the dismissal of the second count the court refused to strike this testimony (Abst. 57).

Muriel Minch (Abst. 26) testified that she visited the doctor but that her treatment or operation was interrupted by the police.

Mrs. Walke (Abst. 45) was withdrawn by the State before she completed her testimony. Her partial testimony was stricken, but its substance was shown out of the presence of the jury (Abst. 53) in order that the record might show all that was before the grand jury. There was no proof, outside of the possible opinion of these women, that any one of them was pregnant.

A policeman (Abst. 49) testified to the arrest of the defendant. The trial court overruled a motion for new trial (Abst. 5, 73) and in arrest of judgment (Abst. 5, 75), and the defendant took exception to all adverse rulings, including the entry of the judgment.

The judgment of the trial court was affirmed by the Supreme Court of Illinois on January 17, 1945 (R. 6-7). A petition for rehearing was denied and the judgment made final on March 15, 1945 (R. 9). The record was abstracted and printed for the use of the Supreme Court of Illinois, and the Clerk of that court has made use of the printed abstract in certification of the record to this court. Your petitioner is at liberty on bail approved by the Supreme Court of Illinois and time has been allowed in that court in which to make this application (R. 10).

B.

Basis of the Court's Jurisdiction.

This court may by certiorari have this cause certified to it for determination by virtue of Section 237(b) Judicial Code 28 U.S.C. Section 344(b) as supplemented by the Rules of this court, Rule 38, 43.

C.

Questions Presented.

Upon the surface it may appear as if we merely complain of trial errors where our points have been decided against your petitioner by the Illinois Supreme Court. Our claim to federal protection goes further as is explained under the next hearing *i.e.*, "Reasons for Granting the Writ."

1. Where matters which ought to be stated in the indictment are omitted and the excuse is stated that such facts were unknown to the grand jurors, is the truthfulness of the excuse given put in issue by the plea of not guilty and is the burden upon the State to prove such allegation?

2. After the defendant demonstrates without dispute the falsity of the allegation that certain material facts were unknown, can a conviction be sustained? Does such an indictment satisfy due process?

3. Where the evidence shows beyond question that the only person guilty was the defendant, can he be convicted of conspiring with himself?

4. Can the State of Illinois be permitted to imprison the defendant in the absence of proof of the *corpus delicti*?

5. Has the defendant in this case been afforded due process of law as guaranteed by the fourteenth amendment?

6. Are the errors here complained of such as it can be seen that the State has violated principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental?

D.

Reasons for Granting the Writ.

Illegal abortions were being performed wholesale in the city of Chicago. There was every reason to suspect that the State officials corruptly permitted the practice for revenue.

The police attached to the office of the State's Attorney raided the office of one Ada Martin alleged to be the head of an abortion ring. This raid was later condemned as illegal by the Supreme Court of Illinois (*People* v. *Martin*, 382 Ill. 192). As appears from the opinion and the one rendered in *People* v. *Moriarity*, 380 Ill. 148, one of the police officers murdered one of the Martin family. The raid upon the office of your petitioner followed. The indignation of the State's Attorney resulting from the unfavorable publicity and scandal caused him to disregard all known rules of law and procedure in order to convict your petitioner. The trial was just as much a farce as if the impulse was race hatred or mob force. The trial assumed an outward appearance of due form, while in fact, it resulted in the sacrifice of a victim to the State's Attorney. The Supreme Court of Illinois failed to read between the lines as to the cause of the illegal trial and committed error in its determination of the legal principles involved. The legal principles were intended to safeguard your petitioner as against such a trial and when they were denied him, he was denied due process of law as such is protected by this court by virtue of the fourteenth amendment.

1. The Supreme Court of Illinois has sanctioned a departure by the lower court from the accepted and usual course of judicial proceeding.

2. The Supreme Court of Illinois has decided federal questions in a way which conflicts with the decisions of this court.

E.

Prayer.

Your petitioner has filed the record of the Supreme Court of Illinois in this case and has complied with the rules of this court in all other respects and prays that such orders be entered as may be required for your Honors to take jurisdiction by certiorari, and that the judgment be reversed and that your petitioner be afforded such other and further relief in the premises as to this Honorable Court may seem just.

Respectfully submitted,

FRANK L. NATHANSON,
Petitioner,

By WM. SCOTT STEWART,
Counsel for Petitioner.